

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4 AMERICAN HONDA MOTOR CO., INC.,)
5 Plaintiff,)
6 vs.)
7 ST. PAUL FIRE & MARINE INSURANCE CO.;)
8 ZURICH AMERICAN INSURANCE CO.; NATIONAL)
9 UNION FIRE INSURANCE CO. OF PITTSBURGH;)
10 ARCH SPECIALTY INSURANCE CO.; and)
11 AMERICAN GUARANTEE AND LIABILITY)
12 INSURANCE CO.;)
13 Defendants.)
14 _____)
15 ST. PAUL FIRE & MARINE INSURANCE CO.,)
16 Crossclaim Plaintiff,)
17 vs.)
18 ZURICH AMERICAN INSURANCE CO. and)
19 AMERICAN GUARANTEE AND LIABILITY)
20 INSURANCE CO.,)
21 Crossclaim Defendants*.)
22 _____)
23 ST. PAUL FIRE & MARINE INSURANCE CO.,)
24 Third-Party Plaintiff,)
25 vs.)
26 STELLAR STRUCTURES, LLC; CONTINENTAL)
27 CASUALTY COMPANY; VALLEY FORGE INSURANCE)
28 COMPANY; AMERICAN CASUALTY COMPANY OF)
READING, PENNSYLVANIA; NATIONAL FIRE)
INSURANCE COMPANY OF HARTFORD; and)
TRANSPORTATION INSURANCE COMPANY;)
Third-Party Defendants.)

No. 03:11-cv-00344-HU

**FINDINGS AND
RECOMMENDATION ON
MOTION TO SUBSTITUTE
AND REALIGN PARTIES,
AND MOTION FOR STAY**

*Both Crossclaim Defendants have been dismissed with prejudice as primary Defendants, but remain as Crossclaim Defendants.

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19 of Hartford; and Transportation Insurance Company

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1 HUBEL, Magistrate Judge:

2 This case is before the court on two motions filed by the
3 plaintiff - a Motion to Stay (Dkt. #147), and a Motion for
4 Substitution and Realignment to Reflect the Real Parties in
5 Interest (Dkt. #152). In my Order entered April 4, 2012 (Dkt.
6 #130), I discussed the procedural history of this case in some
7 detail, and will not repeat the discussion here. In a nutshell,
8 this case concerns which one or more of the many insurance
9 companies who are parties in the case, if any, must pay a multi-
10 million-dollar judgment obtained by the plaintiff against Opus
11 Northwest, LLC ("Opus"), in connection with damage Honda sustained
12 to its distribution facility located in Gresham, Oregon. The
13 parties are identified herein as "Honda" for American Honda Motor
14 Co., Inc.; "St. Paul" for St. Paul Fire & Marine Insurance Co.;
15 "National Union" for National Union Fire Insurance Co. of
16 Pittsburgh; and "Stellar" for Stellar Structures, LLC. Stellar,
17 Continental Casualty Company; Valley Forge Insurance Company;
18 American Casualty Company of Reading, Pennsylvania; National Fire
19 Insurance Company of Hartford; and Transportation Insurance
20 Company; are referred to collectively as "Stellar's Insurers."

21 Both of the current motions are fully briefed, and the court
22 heard oral argument on the motions on June 20, 2012. Having
23 considered the parties' arguments fully, I recommend granting
24 Honda's motion to stay the case, but issuing the stay for a
25 definite period, rather than an unlimited period. Because I
26 recommend the case be stayed, I further recommend that a decision
27 on the motion to substitute and realign the parties be delayed
28 until the stay is lifted.

DISCUSSION

2 Honda asks the court to stay this action until the Oregon
3 Supreme Court rules on a current appeal from a decision by the
4 Oregon Court of Appeals in *Morgan v. Amex Assurance Co.*, 242 Or.
5 App. 665, 259 P.3d 39 (2011) (a copy of which has been submitted by
6 Honda as an Appendix to its motion, at Dkt. #151). Honda argues
7 the outcome of the *Morgan* appeal "will directly determine whether
8 ORS 742.061 (Oregon's attorney fee statute for insurance coverage
9 actions) clearly applies in the instant coverage action on the
10 subject policies." Dkt. #147, pp. 2-3. Stated differently, Honda
11 claims the issue on appeal in *Morgan* will directly affect Honda's
12 entitlement to attorney's fees in the instant case, which will make
13 a dramatic difference in the way Honda approaches this case as it
14 continues. Dkt. #148, pp. 2-3.

15 The issue in *Morgan* is whether ORS § 742.061 applies to
16 insurance policies issued outside the State of Oregon. Falling
17 within Title 56, Chapter 742, of the Oregon Revised Statutes,
18 comprising Oregon's Insurance Code, ORS § 742.061, entitled
19 "Attorney fees in actions on policy; exceptions," provides, in
20 relevant part, as follows:

(1) . . . [I]f settlement is not made within six months from the date proof of loss is filed with an insurer and an action is brought in any court of this state upon any policy of insurance of any kind or nature, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorney fees shall be taxed as part of the costs of the action and any appeal thereon. . . .

27 ORS § 742.061(1). On its face, the statute appears to allow
28 recovery of attorney fees "upon any policy of insurance of any kind

1 or nature." However, in *Morgan*, the trial court held "ORS 742.001
 2 limits the scope of chapter 742, including ORS 742.061, to
 3 'insurance policies delivered or issued for delivery in this
 4 state[.]'" *Morgan*, 242 Or. App. at 667, 259 P.3d at 39-40. The
 5 Oregon Court of Appeals agreed. *Id.*

6 Section 742.001, entitled "Application of ORS chapters 742,
 7 743 and 743A," provides, "This chapter [i.e., chapter 742] and ORS
 8 chapters 743 and 743A apply to all insurance policies **delivered or**
 9 **issued for delivery in this state** except: (1) Reinsurance. (2) West
 10 marine and transportation insurance policies. (3) Surplus lines
 11 insurance policies." ORS § 742.001 (emphasis added). The *Morgan*
 12 plaintiff argued ORS § 742.061 predated the enactment of ORS
 13 § 742.001, and originally was not part of chapter 742. The
 14 plaintiff reasoned "the later enactment of ORS 742.001 and recodi-
 15 fication of ORS 742.061, which brought those provisions together in
 16 the same chapter, were not intended to narrow the effect of ORS
 17 742.061." *Id.*, 242 Or. App. at 669, 259 P.3d at 40. The plaintiff
 18 further argued that because ORS § 742.061 more specifically
 19 expresses the legislative intent, it controls over the more general
 20 expression of legislative intent in ORS § 742.001. *Id.*

21 The defendant urged the court to give effect to both
 22 provisions, operating together, with the result that ORS § 742.061
 23 would apply only "to insurance policies delivered or issued for
 24 delivery in Oregon[.]" *Id.*, 242 Or. App. at 669, 259 P.3d at 41.

25 The Oregon Court of Appeals found the two provisions easily
 26 can be read together, and they can be interpreted consistently, in
 27 a way that gives effect to both statutes. The court observed that
 28 by holding ORS § 742.061 applicable to "'any' insurance policy

1 'delivered or issued for delivery' in Oregon[,] [t]hat construction
 2 makes the text of both statutes consistent: it limits the
 3 geographical operation of ORS 742.061 and, at the same time,
 4 recognizes that the statute applies broadly to any type of
 5 insurance policy." *Id.*, 242 Or. App. at 670, 259 P.3d at 41. The
 6 court reasoned this construction "does no violence to ORS 742.061."

7 *Id.*

8 The Oregon Supreme Court allowed review on October 20, 2011,
 9 and heard oral argument on March 9, 2012. Honda urges the court to
 10 stay the present action until the Oregon Supreme Court rules in
 11 *Morgan*, asserting the ruling "will fundamentally alter the
 12 landscape of the instant litigation." Dkt. #148, p. 4. Honda
 13 notes all of the insurance policies at issue in the present case
 14 were delivered outside of Oregon. Therefore, knowing whether or
 15 not attorney's fees will be available to Honda will determine how
 16 it proceeds with its claims and defenses in this case, as well as
 17 affecting how Honda may value the case for settlement purposes.

18 Dkt. #148, *passim*.

19 National Union and St. Paul have filed individual responses in
 20 opposition to Honda's motion. National Union argues every litigant
 21 faces the possibility that it will not recover attorney's fees, and
 22 such uncertainty is not a proper basis for staying the case.
 23 National Union asserts the basis of this action is the coverage
 24 issue; any attorney's fee issue will not arise until the end of the
 25 case. Dkt. #161. At oral argument on the motion, National Union
 26 continued to maintain its opposition to a stay.

27 St. Paul argues Honda is requesting a stay "of its own lawsuit
 28 in order to gain a tactical advantage premised on a potential

1 change in the law." Dkt. #164, p. 3 (emphasis in original).
2 St. Paul also intimates Honda knew the *Morgan* case was pending
3 before the Oregon Court of Appeals at the time it filed this
4 action. See *id.*, p. 2. Notably, although St. Paul continues to
5 resist an open-ended stay to await the *Morgan* decision, at oral
6 argument St. Paul indicated it does not oppose a limited stay until
7 the end of October 2012.

8 With regard to the standards for staying an action, Honda
9 relies on *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d
10 857, 863-64 (9th Cir. 1979), which Honda notes was "cited as
11 authoritative" by the court in *Oregon-Columbia Brick Masons Joint
12 Apprenticeship Training Committee v. Oregon Bureau of Labor &
13 Industries*, 2003 WL 25731112, at *2 (D. Or. May 9, 2003) (King,
14 J.). The *Leyva* court observed that a court may stay an action
15 pending resolution of any type of independent proceeding (whether
16 "judicial, administrative, or arbitral in character") that may bear
17 upon the case before the court. *Leyva*, 593 F.2d at 863-64.
18 However, the *Leyva* court further noted that "a stay should not be
19 granted unless it appears likely other proceedings will be
20 concluded within a reasonable time in relation to the urgency of
21 the claims presented in this court." *Id.*, 593 F.2d at 864 (quoted
22 with approval by the court in *Center for Biological Diversity v.
23 Henson*, 2009 WL 1882827, at *3 (D. Or. June 30, 2009) (Coffin,
24 M.J.)). Honda offers statistics regarding the timing of the Oregon
25 Supreme Court's issuance of decisions suggesting a decision in the
26 *Morgan* case reasonably can be anticipated by the end of October
27 2012.

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1 Both National Union and St. Paul argue *Leyva* is distinguish-
2 able from the case at bar. National Union notes that in *Leyva*,
3 there was a parallel arbitration proceeding concurrent with the
4 court action, and the court determined it would be a waste of
5 judicial resources and a burden on the parties for both proceedings
6 to continue at the same time. See *Leyva*, 593 F.2d at 864.
7 National Union argues similar considerations do not exist in this
8 case, where there is no ongoing, parallel proceeding regarding the
9 coverage issues. Dkt. #161, p. 11.

10 St. Paul argues *Leyva* was displaced by the four-part test
11 established by the United States Supreme Court in *Nken v. Holder*,
12 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). In *Nken*,
13 the Court observed that the decision in an appeal may, under
14 certain circumstances, "come too late for the party seeking
15 review," and therefore, "as part of its traditional equipment for
16 the administration of justice, a federal court can stay the
17 enforcement of a judgment pending the outcome of an appeal." *Nken*,
18 556 U.S. at 421, 129 S. Ct. at 1753. The Court described what it
19 called "the 'traditional' standard for a stay," as follows:

20 Under that standard, a court considers four
21 factors: "(1) whether the stay applicant has
22 made a strong showing that he is likely to
23 succeed on the merits; (2) whether the
24 applicant will be irreparably injured absent a
stay; (3) whether issuance of the stay will
substantially injure the other parties
interested in the proceeding; and (4) where
the public interest lies."

25 *Nken*, 556 U.S. at 426, 129 S. Ct. at 1756 (quoting *Hilton v.*
26 *Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d
27 724 (1987)).

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1 Honda argues the four-factor test does not apply to the type
2 of stay it requests here. Rather, Honda argues, the four-factor
3 test applies only in the context of a request to stay a court order
4 pending an appeal of that same order. Dkt. #168, p. 4. The court
5 agrees with Honda's interpretation of *Nken*. The *Hilton* decision,
6 upon which the *Nken* Court relied, discusses the four-factor test's
7 relationship to Federal Rule of Civil Procedure 62(c), which
8 specifies the rules for issuance of an injunction to secure a
9 judgment creditor's rights pending an appeal, and Federal Rule of
10 Appellate Procedure 8(a), which also deals with the procedure for
11 staying execution of a judgment or operation of an order of a
12 district court pending appeal. The *Nken* decision, itself, dealt
13 with a request to block the removal of an alien from this country
14 pending appeal of the removal order. As Honda notes in its reply
15 brief, the four-factor test actually dates back as far as 1958,
16 when it was discussed by the court in *Virginia Petroleum Jobbers*
17 *Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C.
18 Cir. 1958). It is not inconsequential, therefore, that the *Leyva*
19 court cited other cases from the United States Supreme Court and
20 other federal appellate courts without ever mentioning the four-
21 factor test.

22 Decades ago, the United States Supreme Court made observations
23 regarding motions to stay that remain equally applicable today:

24 [T]he power to stay proceedings is incidental
25 to the power inherent in every court to
control the disposition of the causes on its
26 docket with economy of time and effort for
itself, for counsel, and for litigants. How
27 this can best be done calls for the exercise
of judgment, which must weigh competing
interests and maintain an even balance.
28 [Citations omitted.] True, the suppliant for

1 a stay must make out a clear case of hardship
 2 or inequity in being required to go forward,
 3 if there is even a fair possibility that the
 4 stay for which he prays will work damage to
 5 some one else. Only in rare circumstances
 6 will a litigant in one cause be compelled to
 stand aside while a litigant in another
 settles the rule of law that will define the
 rights of both. Considerations such as these,
 however, are counsels of moderation rather
 than limitations upon power. . . .

7 *Landis v. North Am. Co.*, 299 U.S. 248, 255, 57 S. Ct. 163, 166, 81
 8 L. Ed. 153 (1936)).

9 The "competing interests" that must be balanced in considering
 10 a motion for stay include "possible damage which may result from
 11 the granting of a stay, the hardship or inequity which a party may
 12 suffer in being required to go forward, and the orderly course of
 13 justice measured in terms of the simplifying or complicating of
 14 issues, proof, and questions of law which could be expected to
 15 result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th
 16 Cir. 1962).

17 Having considered the parties' competing interests in this
 18 case, and also in light of St. Paul's indication that it does not
 19 oppose a limited stay, I find Honda's motion should be **granted in**
 20 **part**, with the case being stayed until **October 31, 2012**, with one
 21 exception; i.e., the pending arbitration between Honda, Stellar,
 22 and Stellar's Insurers may proceed without abatement.

23 In light of my recommendation that this case be stayed until
 24 October 31, 2012, I further recommend the court **reserve ruling** on
 25 Honda's motion to substitute and realign parties until the stay has
 26 been lifted. Should the District Judge adopt my recommendation, a
 27 separate order will be entered extending all current deadlines in
 28

1 this case by four months and ten days; i.e., the amount of time
2 between today's date and October 31, 2012.

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4 ***SCHEDULING ORDER***

5 These Findings and Recommendations will be referred to a
6 district judge. Objections, if any, are due by **July 9, 2012**. If no
7 objections are filed, then the Findings and Recommendations will go
8 under advisement on that date. If objections are filed, then any
9 response is due by **July 26, 2012**. By the earlier of the response
10 due date or the date a response is filed, the Findings and
11 Recommendations will go under advisement.

12 IT IS SO ORDERED.

13 Dated this 20th day of June, 2012.

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15 /s/ Dennis J. Hubel

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Dennis James Hubel
United States Magistrate Judge

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